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U.S. Citizenship and Immigration Services

[redacted]

FEB 12 2004

FILE: [redacted] Office: TEXAS SERVICE CENTER Date:
SRC 99 168 51517

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The petition will be remanded for further action.

The petitioner is an Indian restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor. The lack of the original, stamped exemplar in the record, in part, occasions the remand of this appeal.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter turns, in part, on whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date. A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all of the qualifications specified on the labor certification as of the petition's priority date. 8 C.F.R. § 204.5(d). *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petition's priority date is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. In this case, it is March 13, 1996.

The Form ETA 750, as accepted on March 13, 1996, originally named Avtar S. Gidda (G) as the beneficiary. One copy of the Form ETA 750 for G includes Part B. It indicated that G worked for the petitioner from August 1992 to July 1994. The director approved an Immigrant Petition for Alien Worker (I-140) for G, in a notice dated September 4, 1997. On January 9, 1999, the petitioner requested the termination of the Form ETA 750 for G and the substitution of Vikesh Thapar (T) on it. On May 11, 1999, the petitioner filed a new I-140 and Form ETA 750 for T.

In a request for evidence issued July 29, 1999 (RFE), the director detailed such documents and evidence as were required to support the substitution. In response, the petitioner requested the withdrawal of the I-140 and approval notice issued in favor of G and the substitution of an approval for T. The petitioner, also, obtained letters from Lucky Daba & Chicken Corner (Lucky) and Mini's Restaurant (Mini) that stated T's experience as a cook in India from January 1991 to March 31, 1998.

The director considered that the petitioner might retain the priority date for the substituted beneficiary, T, if G had not worked under the individual labor certification. The director weighed photographs, from the Spartanburg, SC Herald-Journal dated August 26, 1992, of the beneficiary working at a restaurant with a different name than the petitioner's. The director determined that the beneficiary had worked in the United States and denied the petition.

On appeal, counsel, presumably referring to G, states that:

> We believe that the alien beneficiary did not enter the United State and worked [sic] under the Labor Certification. The Labor Certification was filed and approved at a time that the beneficiary was not in the employment of the petitioner. He was employed long before the Labor Certification application was filed on its behalf. He never [sic] worked for the petitioner even after [sic] the Labor Certification was issued.

Counsel's brief clarifies that:

> There is evidence in [records of CIS] that [G] has not applied for neither has he obtained permanent resident status using this certified Labor Certification.

Counsel makes a telling criticism of the director's logic. If G worked in the United States for somebody in 1992, it does not follow that he worked for the petitioner pursuant to the Form ETA 750 with a priority date of March 13, 1996. Counsel, however, gives a speculative account of G's employment after July 1994. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Other points of counsel are pertinent. The petitioner may request the substitution of a beneficiary for the one originally named on the Form ETA 750. *Kooritsky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994).

Pertinent directions of Citizenship and Immigration Services (CIS), formerly the Service or the INS, in "Substitution of Labor Certification Beneficiaries," dated March 7, 1996 (1996 instructions), stated:

> [CIS] should ensure that the petitioner is not using the same labor certification more than once. The adjudicator. . . must determine whether the original labor certification beneficiary has immigrated or applied for adjustment of status based on the labor certification and I-140 petition filed by the employer. The adjudicator must also look up the status on any previous petition. . . .

The record does not reflect the director's search for the status of the original beneficiary. Applicable data systems now reveal no immigrant admission or application for adjustment of status for G. Hence, the director should have automatically revoked the I-140 as to G.

Provisions of 8 C.F.R. § 205.1(a) require automatic revocation:

> (3) If any of the following circumstances occur. . ., before the decision on [the beneficiary's] adjustment application becomes final:
>
> . . . (iii) . . . (C) Upon written notice of withdrawal, filed by the petitioner, in employment-based preference cases, with any officer of [CIS] who is authorized to grant or deny petitions.

The 1996 instructions authorize the substitution of T and specify that:

> If the original I-140 petition with the [Form ETA 750] is located at the service center, the adjudicator should retrieve the original petition, send out a notice of automatic revocation of the initial I-140 approval, and place the original [Form ETA 750] with the second I-140 petition. . . .

The record contains neither a notice of revocation nor the original Form ETA 750. Moreover, copies of Form ETA 750 have a stamped and initialed legend, covering portions of blocks 7, 11, and 12 in Part A, stating,

"Correction Approved by Certifying Officer." The copies, however, include no correction or amendment, no date for them, and no additional page to express any.

These defects require the remand of the record to the director to retrieve the Form ETA 750. The director's inquiry must include any further requirement of the Form ETA 750, and, may encompass, at the priority date, the qualifications of T, as exacted in the Form ETA 750.

Also, AAO has noted the petitioner's 1996 Form 1120-A, U.S. Corporation Short-Form Income Tax Return, and 1997 Form 1120, U.S. Corporation Income Tax Return. They supported the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence. They reflected, for 1996 and 1997, respectively, taxable income before net operating loss deduction of $21,551.76 and $23,727, equal to, or greater than, the proffered wage of $16,120 per year. The 1996 and 1997 federal income tax returns reported, in Schedule L, the difference of current assets minus current liabilities, i.e., net current assets. They were $37,851.94 in 1996 and $41,758, equal to, or greater than, the proffered wage.

The petitioner offered no further evidence in response to the RFE as to the ability to pay the proffered wage for 1998 or pursuant to the petition for T. *See* 8 C.F.R.5(g)(2). The petitioner may offer such proof on remand, if requested.

If the inquiry is favorable, the director must fulfill requirements of the 1996 instructions:

> C. Disposition of Substitution Requests
>
> If the [director] determines that the substituted alien meets the requirements set forth in [Form ETA 750 as of [the priority date] and the I-140 petition is otherwise approvable, the I-140 petition shall be approved and processed like any other I-140 petition . . . .

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the original Form ETA 750, of the putative amendment to the Form ETA 750, of qualifications of the substituted beneficiary, and of the ability to pay the proffered wage continuing until the beneficiary obtains lawful permanent residence. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.